Paper No. 28

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARY M. FOLEY and BEAUFORT M. LANCASTER

Appeal No. 2001-1390
Application No. 08/922,599

ON BRIEF[1]

Before COHEN, NASE, and BAHR, Administrative Patent Judges.

COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 and 6. Claims 2 through 5 stand objected to by the examiner, but would be allowable if amended as indicated (Paper No. 19; page 4). These claims constitute all of the claims in the application.

[1] The hearing set for Thursday, September 13, 2001 was waived by appellants (Paper No. 27).

Appellants' invention pertains to a method for determining forced-choice preference information. A basic understanding of the invention can be derived from a reading of exemplary claim 1, a correct copy of which appears in the APPENDIX to the examiner's answer (Paper No. 22).

As evidence of obviousness, the examiner has applied the document specified below:

David R. Peryam and Francis J. Pilgrim (Peryam), "Hedonic Scale Method of Measuring Food Preferences," Food Technology, Vol. XI, No. 9, pages 9 through 14 (1957)[2]

The following rejection is before us for review.

Claims 1 and 6 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the Peryam reference.

[2] The document of record, with pagination 1 through 6, is a reprint of the specified article from Food Technology. While the examiner has referred to pages 1 and 2 of this document in the answer (page 3), the final rejection refers also to page 6, indicating to us that the entirety of the document (pages 1 through 6) was the applied evidence. We refer to the content of the applied reference by pages 1 through 6.

The full text of the examiner's rejection and response to the argument presented by appellants appears in the answer (Paper No. 22), while the complete statement of appellants' argument can be found in the main and reply briefs (Paper Nos. 21 and 24).

OPINION

In reaching our conclusion on the obviousness issue raised in this appeal, this panel of the board has carefully considered appellants' specification and claims, the applied document,[3] the declaration of Beaufort M. Lancaster (one of the named inventors), and the respective viewpoints of appellants and the examiner. As a consequence of our review, we make the determination which follows.

[3] In our evaluation of the applied reference, we have considered all of the disclosure of the document for what it would have fairly taught one of ordinary skill in the art. See In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966). Additionally, this panel of the board has taken into account not only the specific teachings, but also the inferences which one skilled in the art would reasonably have been expected to draw from the disclosure. See In re Preda, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

We sustain the rejection of appellants' claim 1. It follows that the rejection of claim 6 is likewise sustained since, as indicated in the main brief (page 3), claims 1 and 6 stand together. Our reasoning appears below.

Claim 1 is drawn to a method for determining forced-choice preference information, said method comprising, inter alia, processing hedonic data from all of a number of test subjects to determine at least one predicted forced choice preference result, with said at least one predicted forced choice preference result being indicative of the likelihood that a test subject would select one of two or more test samples over another of said test samples in a forced choice comparison of a pair of the test samples.

At this point, we refer to appellants' statement in the "Summary of the Invention" section of the specification (page 4 and 5) that

> it is possible to determine the likelihood that a consumer will choose one product (product A) over another product (product B) of the same type simply by conducting hedonic

testing and without specifically conducting forced choice testing.[4]

Simply stated, it is quite apparent to us, from a reading of the overall Peryam reference, that those having ordinary skill in the art, at the time of appellants' invention, would have been able to predict the likelihood that a consumer would select one product over another from a consideration of or processing of the data derived from hedonic testing. As expressly revealed by Peryam (page 2, column 2, lines 20 through 25), the hedonic scale method yields direct responses for "predicting actual behavior" toward food. Of particular significance, is the teaching in the Peryam document of the interpretation and use of hedonic scale data (page 4, column 2, lines 49 through 58). More specifically, the reference reveals that, to a food technologist (one having ordinary skill in the art), hedonic test data yields information as to the "probable acceptance" of foods by consumers; in other words, foods are evaluated (consumer preference) indirectly by making inferences from behavioral measures (hedonic testing). The hedonic scale method is recognized for yielding information

[4] Appellants indicate (specification, page 3) that, in forced choice testing, a consumer is forced to choose which product he or she prefers from among a forced selection of two possible products.

about "probable acceptance" (page 5, column 1, lines 56 through 62). As explicitly stated by Peryam (page 6, column 1, lines 9 through 11),

> accept both the measurement of preference and the prediction of acceptance as the objectives of hedonic test measurement.

The above teachings within the Peryam reference provide ample evidence that the method of claim 1 would have been obvious to one having ordinary skill in the art; in particular, the reference document would have been suggestive of the step of processing hedonic test data to determine at least one predicted forced choice preference result (acceptance), the result (acceptance) being indicative of the likelihood that a test subject would select one test sample over another in a forced choice comparison.

The arguments advanced by appellants (main brief, pages 3 through 7, and reply brief, pages 1 and 2) do not persuade us of error on the part of the examiner in concluding that claim 1 would have been obvious based upon the overall teaching of the Peryam document. The argument is presented (main brief, page 4) that the prior art does not suggest "calculating" a forced choice

preference from hedonic data. However, contrary to appellants' point of view, claim 1 does not address a "calculating" step. Giving claim 1 its broadest reasonable interpretation, it appears to us that those having ordinary skill in the art would comprehend the claimed "processing" of hedonic test data to determine at least one predicted forced choice result to broadly denote a mental assessment or review of hedonic test data to determine at least one predicted forced choice result. For example, if two consumers, in hedonic testing, tested only competing food products A and B, on the basis of taste and appearance categories, and each gave the highest rating in both categories to product A, it is quite apparent to us that one having ordinary skill in the art would have been able to process (mentally assess or consider) this hedonic test data and predict a forced choice preference result (product A). The latter view is clearly supported by the Peryam disclosure. Declarant points out (paragraph 9) that the Peryam reference ("Hedonic Scale Method of Measuring Food Preferences") has been reviewed but that the examiner is incorrect in asserting that it would have been obvious from this reference "to process the hedonic scale data to obtain forced choice comparison information," since there is no suggestion in the reference to do so. It appears to us that

declarant does not appreciate that the broad language of claim 1 does not require the specific processing (calculating) methodology disclosed in the present application. Thus, the teaching of Peryam, as a whole, would have been suggestive of the claim 1 method, as indicated above.

In summary, this panel of the board has sustained the rejection of claims 1 and 6 under 35 U.S.C. § 103(a).

The decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

IRWIN CHARLES COHEN Administrative Patent Judge	)	
JEFFREY V. NASE Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JENNIFER D. BAHR Administrative Patent Judge	)	

ICC/lbg

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